

No. 23-625

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IN THE  
**Supreme Court of the United States**

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TEL JAMES BOAM,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**BRIEF OF FEDERAL PUBLIC AND  
COMMUNITY DEFENDER ORGANIZATIONS  
OF THE NINTH CIRCUIT AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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**INTERESTS OF THE *AMICI CURIAE***

The Ninth Circuit Federal and Community Defender Organizations provide representation to accused persons who lack financial means to hire private counsel under 18 U.S.C. § 3006A. The Defenders advocate on behalf of the criminally accused, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. This mission includes resisting expansive interpretations of criminal statutes, which is consistent with Supreme Court decisions that narrow the scope of federal statutes and that reject broad interpretations asserted by federal prosecutors. Specific to this case, Defenders regularly represent individuals charged with manufacturing child pornography under circumstances that reach beyond the scope of the statute’s plain meaning, especially as construed consistently with the First Amendment’s protection against overbroad statutes and the Due Process Clause’s protections against vague statutes. This brief supports Mr. Boam’s position that surreptitious video recording, without more, does not constitute manufacture of child pornography where no “explicit sexual conduct” is portrayed and where he did not “use” a minor to produce sexually explicit conduct.<sup>1</sup>

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<sup>1</sup> No party or party’s counsel or any person other than employees of *amici curiae* authored any part of this brief or contributed money to fund preparing or submitting the brief. After notice of intent to file this brief, no party has objected.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Williams v. United States*, this Court required specificity in the statutory language describing child pornography: “Sexually *explicit* conduct’ connotes actual depiction of the sex act rather than merely the suggestion that it is occurring.” 553 U.S. 285, 296-97 (2008) (emphasis in original). In contrast, the Ninth Circuit adopted what have become known as the *Dost* factors, which add a subjective component—the defendant’s sexual response to the image—in determining whether an image constitutes child pornography. *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). Rather than staying true to the statutory language, the *Dost* court relied on six judicially-created factors. *Id.* at 832.

Many courts and commentators have rejected *Dost*’s subjective framework as inconsistent with and an extension of the conduct described in the statute, concluding that the statutory definition of “sexually explicit conduct” in 18 U.S.C. § 2256(2)(A) requires an objective test. This Court should grant a writ of certiorari to resolve the conflicting approaches of different federal circuit courts to this statute. The Court should also grant the writ to address the exceptionally important question whether the Ninth Circuit’s reliance on *Dost*’s judicially-created subjective factors for determining whether an image constitutes “sexually explicit conduct” constitutes judicial legislation inconsistent with this Court’s

rules of statutory construction and the separation of powers.

Varying interpretations of the statute prohibiting manufacture of child pornography have fractured the Circuits. Many courts have questioned or rejected *Dost's* judicial injection of a subjective standard or adopted parts of its test. This Court should grant certiorari to resolve conflicts among the Circuits in favor of the narrow construction required by this Court's bedrock rules of statutory construction:

- Consistent with *Williams* and other Supreme Court cases, the child pornography production statutory provisions must be construed to avoid unconstitutional vagueness under the Due Process Clause and overbreadth under the First Amendment.
- The rule of *expressio unius est exclusio alterius* applies because some statutes, including the federal sex abuse statute, expressly reference the defendant's state of mind, while the child pornography statute contains no such subjective element.
- The rule of *noscitur a sociis* favors a purely objective test because the statutory list of words associated with "sexually explicit conduct" can all be objectively determined.
- Expanding federal criminal jurisdiction to surreptitious videos runs counter to the clear-congressional-statement rule, which normally requires statutory clarity before federal

jurisdiction can intrude into the States' traditional governance over criminal violations.

- If after applying all the rules of construction there were doubt, the narrow construction of criminal statutes and the rule of lenity would require reading the statute to only encompass objectively qualifying images.

Further, the Ninth Circuit's broad interpretation of "uses" is inconsistent with this Court's narrow active construction of the term. In *Dubin v. United States*, this Court rejected the government's broad reading of "uses" in the aggravated identity theft statute. 599 U.S. 110, 130-31 (2023). Similarly, based on the text of the child pornography statute, the active "uses" element forecloses expanding the statute to encompass passive surreptitious recording.

This Court should also grant the writ because of the exceptional importance of the issue. The punishments authorized by the statute are severe, and its expansive construction violates the separation of powers. This Court provides a critical check on prosecutorial and judicial broadening of criminal laws beyond their text, as demonstrated by a consistent line of recent cases in which the Court narrowed the scope of statutes being enforced or construed beyond their plain text and the rules of statutory interpretation.

**A. This Court Should Grant The Writ Of Certiorari Because The *Dost* Approach Clashes With Other Circuits And This Court's Rules Of Statutory Construction.**

*Dost's* focus on subjective intent has fared poorly in other courts, with some rejecting the subjective element altogether and others expressing skepticism and partially adopting its test. The discord among courts on this important question begs for this Court's resolution to assure that the harsh punishments authorized by the pornography statute do not depend on the jurisdiction in which the conduct occurs. The disarray among the courts has resulted in blunt condemnation of the Ninth Circuit's approach:

- “If Amirault’s subjective reaction were relevant, a sexual deviant’s quirks could turn a Sears catalog into pornography.” *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).
- “We must, therefore, look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand—a legal analysis of the sufficiency of the evidence of lasciviousness.” *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989).
- “[O]verreliance on the intent of the photographer, and his idiosyncratic desires, raises constitutional concerns regarding criminalization of expressive conduct and

creates a risk that a defendant could be convicted for being sexually attracted to children without regard to whether the material produced is, objectively, child pornography.” *United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018).

- “A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic. Conversely, a photographer may be guilty of child pornography even though he is not aroused by the photos he produces purely for financial gain.” *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring).
- Because “the sixth *Dost* factor in particular has proven to be analytical quicksand,” some courts “reject the use of the *Dost* factors as a ‘test’ or an analytical framework for determining whether certain materials constitute child pornography.” *State v. Whited*, 506 S.W.3d 416, 437 (Tenn. 2016).<sup>2</sup>
- “Laws are supposed to give notice so that people know what they may and may not do. Yet 18 U.S.C. § 2251(a), as understood [applying *Dost*], leaves everything to a jury’s sensibilities. That is not how criminal law should work. A conclusion that someone is a scoundrel—a fair description of [the

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<sup>2</sup> The state statute utilized language similar to the federal statute, resulting in the Tennessee court’s detailed critique of the *Dost* approach.

defendants]—is not enough for criminal liability.” *United States v. Donoho*, 76 F.4th 588, 601-02 (7th Cir. 2023) (Easterbrook, J., concurring).

- *United States v. Hillie*, 39 F.4th 674, 688 (D.C. Cir. 2022) (“[T]he *Dost* factors stray too far from [*Williams*]’ basic teaching, allowing a depiction that portrays sexually *implicit* conduct in the mind of the viewer to be caught in the snare of a statute that prohibits creating a depiction of sexually *explicit* conduct performed by a minor or by an adult with a minor.”) (emphasis in original).

See generally Laura E. Avery, *The Categorical Failure of Child Pornography Law*, 21 Widener L. Rev. 51, 74-77 (2015) (discussing the “highly subjective, contextually dependent” *Dost* factors); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437, 1468-72 (2014) (analyzing *Dost*’s shortcomings); Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 953 (2001) (noting that “the *Dost* test has produced a profoundly incoherent body of case law.”).

The disarray among the Circuits regarding the *Dost* factors should be resolved by narrowing the statute to an objective test of whether the image constitutes “sexually explicit conduct.” This Court’s rules of statutory interpretation, guided by the principle that Congress, not the Judiciary, proscribes conduct and prescribes punishment, compel rejection of the Ninth Circuit’s subjective-intent gloss based on *Dost*.

**1. The Due Process Clause And The First Amendment Require Narrowing Of “Sexually Explicit Conduct” To Images That Objectively Portray Sexual Conduct Involving Children.**

The *Dost* court’s expansive construction of “lascivious exhibition” of the genitals, as constituting “sexually *explicit* conduct,” is irreconcilable with *Williams*’ narrowing of “sexually *explicit* conduct” to depictions of sexual conduct. 553 U.S. at 296-97 (emphasis in original).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002), this Court affirmed the lower court’s ruling that provisions of the Child Pornography Prevention Act of 1996 (18 U.S.C. §§ 2252A and 2256) were unconstitutionally overbroad under the First Amendment without reaching vagueness under the Due Process Clause that the Ninth Circuit also found in *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999). After *Free Speech Coalition*, this Court in *Williams* upheld Congress’s successor statute against First Amendment and vagueness challenges. But to do so, the Court narrowed the statute’s terms by employing the “commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated.” *Williams*, 553 U.S. at 289. And in delivering the opinion of the Court, Justice Scalia cabined the term “sexually explicit conduct” by emphasizing “explicit” and by noting that the phrase



“connotes actual depiction of the sex act[.]” *Williams*, 553 U.S. at 296-97.

Contrary to the specificity required in *Williams* to uphold the statute, *Dost*’s injection of a subjectively based actus reus impermissibly expands the statute back to the type of vagueness and overbreadth condemned in the *Free Speech Coalition* opinions. And the statute speaks for itself in limiting its reach, mandating a minimum 15-year prison term for “[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” 18 U.S.C. § 2251(a), (e). In focusing on depictions of minors and defining “sexually explicit conduct” to include the phrase “lascivious exhibition,” the statute provides specific, objective descriptions. *Id.* § 2256(2)(A)(i)-(v).

*Free Speech Coalition* and *Williams* frame this Court’s clarity-and-certainty requirement for a valid federal child pornography statute. But by inserting a subjective element into the statute’s objective descriptions of the actus reus, *Dost* continues to infect the statute with vagueness and overbreadth while the narrower construction is true to the statutory text and avoids such constitutional problems. *See Skilling v. United States*, 561 U.S. 358, 405 (2010) (“It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.”).

With *Dost*’s subjective approach, an image of a minor constitutes child pornography if it was

“intended or designed to elicit a sexual response in the viewer.” *Dost*, 636 F. Supp. at 832. This subjective approach is divorced from the criminal statute and criminalizes images depending on whether the images subjectively arouse a pedophile, a voyeur, or an ordinary person. This Court has consistently invalidated criminal statutes because of similarly vague standards. By narrowly construing the statute, this Court vindicates its precedent rejecting the expansive reading of federal criminal statutes.

**2. Congress Included Subjective Factors In A Different Section Of The Same Act, So Their Absence In The Section Defining “Sexually Explicit Conduct” Forecloses Expansion Of That Definition.**

“When Congress includes language in one section of a statute but omits it from a neighbor, [this Court treats] that difference in language [as conveying] a difference in meaning (*expressio unius est exclusio alterius*).” *Bittner v. United States*, 598 U.S. 85, 94 (2023). The objective test for “sexually explicit conduct” finds support in the definitional section’s *lack* of any reference to the defendant’s intent or purpose. 18 U.S.C. § 2256(2)(A)(i)-(v). Unlike § 2256, a neighboring section’s definition of “sexual act” *includes* the subjective intent of the accused in its definition of sexual touching: “the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years *with an intent to abuse, humiliate, harass,*

*degrade, or arouse or gratify the sexual desire of any person.*” 18 U.S.C. § 2246(2)(D) (emphasis added).

Congress could have imported subjective-intent language into “sexually explicit conduct,” to define “lascivious exhibition” as it did in § 2246(2)(D) but did not do so. The statutory silence should not be filled by *Dost*’s judicially-created subjective intent approach. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (brackets and internal quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord Lagos v. United States*, 138 S. Ct. 1684, 1689-90 (2018); *Honeycutt v. United States*, 581 U.S. 443, 451-52 (2017); *Dean v. United States*, 581 U.S. 1170, 1177 (2017).

This rule of construction also applies because Congress expressly enacted a separate statute punishing invasions of privacy on federal enclaves in the Video Voyeurism Prevention Act of 2004. Pub. L. No. 108-495, 118 Stat. 3999 (codified at 18 U.S.C. § 1801). Where Congress seeks to federalize privacy crimes, Congress has demonstrated how to do it, setting out protections against “acts of video voyeurism[.]” 150 Cong. Rec. H7267-68 (daily ed. Sept. 21, 2004) (statement of Rep. James Sensenbrenner). Video voyeurism can be criminalized and condemned while being distinct from the creation

of images of “sexually explicit conduct” that Congress proscribed in a different statute.

### **3. The *Noscitur A Sociis* Canon Requires An Objective Definition Of “Sexually Explicit Conduct.”**

“Under the familiar interpretive canon *noscitur a sociis*, ‘a word is known by the company it keeps.’” *Dubin*, 599 U.S. at 124 (quoting *McDonnell v. United States*, 579 U.S. 550, 568-69 (2016)). “This canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” *Id.* at 124-25 (quoting *McDonnell*, 579 U.S. at 569). In *Williams*, this Court expressly referenced the rule of *noscitur a sociis* as providing an important level of certainty to avoid overbreadth and vagueness in the pornography statute. *Williams*, 553 U.S. at 294. Nonetheless, the *Dost* factors ignore this interpretive rule by injecting subjective factors in a list of objective circumstances defining “sexually explicit conduct.”

Without *Dost*’s subjective expansion, the statute defines “sexually explicit conduct” as “actual or simulated”—

- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (ii) bestiality;
- (iii) masturbation;

- (iv) sadistic or masochistic abuse; or
- (v) lascivious exhibition of the anus, genitals, or pubic area of any person;

18 U.S.C. § 2256(2)(A). Sexual intercourse, bestiality, masturbation, and sadistic abuse are types of conduct that can be objectively categorized as sexual without considering the viewer or actor’s intent. Additionally, the words of the statute contain “both the presence of company that suggests limitation and the absence of company that suggests breadth.” *Lagos*, 138 S. Ct. at 1689. The statute says nothing about images limited to child nudity or to the subjective intent of the actor or viewer. Under *noscitur a sociis*, the child pornography statute should be narrowly construed to foreclose consideration of the subjective intent of the viewer.

**4. Absent A Clear Congressional Statement, The Statute Should Not Be Construed To Expand Federal Criminal Jurisdiction To Include Privacy Crimes Generally Prosecuted In State Courts.**

“Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.” *Bond v. United States*, 572 U.S. 844, 848 (2014). The *Dost* factors’ subjective focus expands § 2256(2)(A) to encompass run-of-the-mill state privacy law violations. Where the government’s broad

interpretation intrudes on traditional state criminal jurisdiction, this Court avoids reading statutes to have such reach in the absence of a clear statement of congressional intent. *Id.* at 857 (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)).

Absent clearly stated congressional intent, this Court has consistently limited the scope of broadly worded federal crimes to preclude federal prosecution of matters traditionally regulated by the States. In *Ciminelli v. United States*, this Court found no clear congressional statement and, therefore, rejected a government theory of fraud because it “vastly expands federal jurisdiction without statutory authorization.” 598 U.S. 306, 315 (2023). “Absent a clear statement by Congress, courts should not read ... statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.” *Id.* (brackets omitted); *see McDonnell*, 579 U.S. at 568-69 (rejecting the government’s “boundless interpretation” of the “official act” element of the federal bribery statute, finding that “significant federalism concerns” supported a narrow reading).

The federal child-pornography-production statute contains no clear statement that it covers surreptitious videos, nor does it contain subjective terms when listing what constitutes an image of “sexually explicit conduct.” The States can and do criminalize and punish privacy-invading videos, but the federal crime must be clearly described to warrant the federal intrusion into what, under the system of federalism, falls within the police power of the States.

**5. The Statute’s Active “Uses” Element Contradicts The *Dost* Factors That Include Passive Surreptitious Recording.**

The Ninth Circuit interpreted the verb “uses” a minor in producing images of “sexually explicit conduct” to include passive recording, stating: “We, along with our sister circuits, ‘broadly’ interpret the ‘use’ element of § 2251(a).” *United States v. Boam*, 69 F.4th 601, 607 (9th Cir. 2023) (citing *United States v. Laursen*, 847 F.3d 1026, 1033 (9th Cir. 2017)). But this Court, in defining the identical statutory word, concluded that a *narrow* reading was appropriate in defining the scope of a federal crime. *Dubin*, 599 U.S. at 118; see *Bailey v. United States*, 516 U.S. 137, 143 (1995) (holding that the term “use” ought to be narrowly interpreted to require evidence of “active employment”). By following this Court’s intervening construction of “uses,” the statute’s element requiring active use of the minor forecloses the Ninth Circuit’s *Dost* factors, which sweep in passive surreptitious recording.

In *Dubin*, the Court noted the “interpretational difficulties” around “use” and the need to consider context to determine congressional meaning of the aggravated identity theft statute. 599 U.S. at 118. In determining that “uses” has a narrow meaning requiring active use, the Court relied on narrowing theories that are directly applicable to the present case:

- The Court looked to the label “aggravated identity theft” as meaning more than ordinary

use, *Dubin*, 599 U.S. at 123-24, just as “sexually *explicit* conduct” means more than passive imagery, *Williams*, 553 U.S. at 296-97 (emphasis in original).

- Applying the canon of *noscitur a sociis*, the neighboring words convey active use in the identify theft context, *Dubin*, 599 U.S. at 124-26, just as the neighboring words for “uses”—“employs, uses, persuades, induces, entices, or coerces”—are all active in the child pornography context, 18 U.S.C. § 2251(a).
- Narrowly construing “uses” also follows the surplusage canon, *Dubin*, 599 U.S. at 126, which equally applies to the present statute because a broad meaning of “uses” would render the neighboring words superfluous.
- Both statutes involve the narrow reading of criminal statutes because “this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes.” *Dubin*, 599 U.S. at 130.

This Court’s intervening authority in *Dubin* requires active use rather than incidental use because the same word “uses” is at issue in both criminal cases.

As in *Dubin*, the specific context of “uses” and the broader context of the statute as a whole support only active use in producing “sexually explicit conduct.” See *Nken v. Holder*, 556 U.S. 418, 426 (2009) (“[S]tatutory interpretation turns on ‘the language itself, the specific context in which that language is



used, and the broader context of the statute as a whole[.]” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The statutory context of the “uses” element forecloses the *Dost* factors’ inclusion of passive surreptitious recordings as production of child pornography.

**6. If Application Of Other Rules Of Construction Were Not To Foreclose *Dost*’s Gloss, The Rule Of Lenity Would Require The Narrow Reading Of The Criminal Statute.**

This Court has “traditionally exercised restraint in assessing the reach of a federal criminal statute.” *Dubin*, 599 U.S. at 129 (quoting *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018)); see *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“[W]here text, structure, and history fail to establish that the Government’s position is unambiguously correct[.]” the Court applies the rule of lenity to “resolve the ambiguity in [the defendant’s] favor.”). If nothing else, the discord generated by *Dost* regarding the scope of “sexually explicit conduct” demonstrates the phrase’s opacity, triggering the requirement of narrowly reading the criminal statute and application of the rule of lenity.

Not only have many state and federal courts rejected the *Dost* approach, in litigation regarding this same statutory language, the Solicitor General appeared to adopt the objective approach. Brief for the United States, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183), 1993 WL 723366, at \*9 (“the material must depict a child lasciviously engaging in

sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).”). The statute so lacks clarity that the government has taken inconsistent positions on its meaning.

The many courts that reject or question the *Dost* factors demonstrate sufficient lack of clarity that, to protect individuals from prosecution for conduct not clearly described in the statute, as well as to protect the separation of powers, narrow construction is required. See *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (strict construction of criminal statutes “is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.”); see *Dubin*, 599 U.S. at 129-30 (“[C]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language.”) (citation omitted). “Penal statutes must be construed strictly.” 1 WILLIAM BLACKSTONE, COMMENTARIES, at 88 (1765).

**B. This Court Should Grant A Writ Of Certiorari Because The Question Of The Statute’s Reach Is Exceptionally Important.**

If Congress intended the act of surreptitiously photographing a naked minor to result in federal criminal liability and a mandatory minimum sentence of 15 years under § 2251(a), such words would be in the statute. See *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) (“Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to

distort.”). This case presents another example of recent cases before the Court in which the Executive Branch seeks to enforce laws beyond the words of the congressional enactment, including:

- *Dubin*, 599 U.S. at 130 (narrowing the broad interpretation of the aggravated identity-theft statute);
- *Ruan v. United States*, 597 U.S. 450, 464 (2022) (narrowing the federal drug statute’s mens rea in rejecting “vague, highly general language of the regulation defining the bounds of” the offense);
- *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (narrowing the Computer Fraud and Abuse Act to avoid attaching “criminal penalties to a breathtaking amount of commonplace computer activity”);
- *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) (narrowing the wire fraud statute to require property as the subject of the fraud);
- *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (narrowing the felon-in-possession-of-a-firearm statute to require proof of knowledge));
- *Marinello*, 138 S. Ct. at 1109 (narrowing law on obstruction of Internal Revenue Service proceedings to require a nexus between conduct and a particular administrative proceeding);

- *McDonnell*, 579 U.S. at 574 (narrowing “expansive” reading of bribery statute);
- *McFadden v. United States*, 576 U.S. 186, 187 (2015) (narrowing the scope of the analogue provisions of the Controlled Substances Act to require knowledge);
- *Burrage v. United States*, 571 U.S. 204, 218-19 (2014) (narrowing the death-results provisions of the Controlled Substances Act to require but-for causation).

This Court acts as a crucial check on both prosecutorial overreach and judicial legislation in a federal system in which the States provide the general police power, with the federal role closely cabined by the text of congressional enactments. See *Bond v. United States*, 564 U.S. 211, 221 (2011) (“The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.”). The trend toward federalization of crime, regardless of the limited scope of congressional language, strongly militates in favor of this Court’s intervention.

In enacting 18 U.S.C. §§ 2251(a) and 2256(2)(A), Congress laid out in verbs six actions that constitute criminal conduct and provided a narrowing definitional section that required “sexually explicit conduct” to meet express criteria, none of which encompasses the surreptitious photographing of a minor engaged in private routines like bathing or undressing. Contrary to the separation of powers, the *Dost* factors do exactly what this Court forbids: “If

judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). The *Dost* factors amend the scope of the federal child pornography statute based on judicial imagination that is not grounded in the plain meaning of the statute.

And the extremely harsh punishments for violation of the statute call for uniformity and narrowing of the statute. Whether the 15-year mandatory minimum applies depends on the jurisdiction in which the offense occurs, based on both acceptance or rejection of the *Dost* factors or their interpretation. The disparities in treatment of similarly situated people undercut the principles of equal protection under law and invoke this Court's authority to achieve uniformity.

The individual liberty at stake, the separation of powers, and the need for consistency in the law all establish compelling needs for this Court to grant the writ of certiorari and reverse the Ninth Circuit's expansive interpretation of the federal criminal statute.

## CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the writ.

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January 10, 2024

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